

Judge Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

DEREK HOYTE, COLUMBIA CREST
PARTNERS, LLC, and COLUMBIA
PACIFIC ENTERPRISES, INC.,

Defendants.

NO. C10-2044BHS

**SECOND AMENDED COMPLAINT FOR
TEMPORARY RESTRAINING ORDER,
PRELIMINARY AND PERMANENT
INJUNCTION, CIVIL PENALTIES AND
DAMAGES**

Plaintiff, UNITED STATES OF AMERICA, for its second amended complaint against defendants DEREK HOYTE, COLUMBIA CREST PARTNERS, LLC, and COLUMBIA PACIFIC ENTERPRISES, INC., alleges:

1. This is a civil action brought by plaintiff United States of America, acting at the request of the United States Forest Service, a component of the United States Department of Agriculture, and the United States Army Corps of Engineers, a component of the United States Department of Defense. The United States Forest Service is the acquiring agency of rights in a certain parcel of property within the boundaries of the Columbia River Gorge National Scenic Area, as further alleged herein. The United States Army Corps of Engineers is the federal agency which is primarily responsible for enforcing the requirements of Sections 301 and 404 of the Clean Water Act, 33 U.S.C. §§ 1311, 1344.

1 2. The Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1345 and 1355,
2 and 33 U.S.C. § 1319.

3 3. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391 and 1395 and
4 33 U.S.C. § 1319 because the acts alleged herein occurred in this judicial district and because the
5 defendants reside in this judicial district.

6 4. The locus of this lawsuit is parcel of property approximately 80 acres in size which
7 is located at 22962 State Highway 14, Washougal, Washington, in Skamania County (hereafter
8 “the Property”). The Property is located within the confines of the Columbia River Gorge
9 National Scenic Area (“CRGNSA”). The Property is also located within an area of the
10 CRGNSA that is designated as a “Special Management Area.” The Property is bounded on the
11 north by State Highway 14 and on all other sides by land owned by the United States and
12 administered by the United States Forest Service.

13 5. Defendants Derek Hoyte and Columbia Crest Partners, LLC are owners of a fee
14 interest in the Property, but subject to a conservation easement on the property held by the
15 United States, as further alleged herein.

16 6. According to records of the Washington Secretary of State, defendant Columbia
17 Crest Partners, LLC, was incorporated as a limited liability corporation (UBI No. 602303274) in
18 Washington on June 13, 2003, but whose registration expired on June 30, 2008, and which as of
19 October 1, 2008 is listed as “inactive.” The registered agent for Columbia Crest Partners, LLC
20 is defendant Derek Hoyte.

21 7. Defendant Columbia Pacific Enterprises, Inc., is a Washington corporation
22 (UBI No. 602300893). Defendant Derek Hoyte is the President, Secretary, Treasurer and
23 Chairman of the Board of Columbia Pacific Enterprises. Defendant Columbia Pacific
24 Enterprises, Inc., together with defendant Derek Hoyte, were founding members of defendant
25 Columbia Crest Partners, L.L.C.

26 8. On March 31, 1995, the then-owners of the property, Richard E. Grams and Helen
27 D. Grams (hereafter “the Grams”) entered into a Conservation Easement Deed with plaintiff
28 United States of America whereby, for good and valuable consideration in the amount of

1 \$456,000.00, the Grantee conveyed to the United States a right to a perpetual easement running
 2 with the land which contains specific limitations on the uses to which the property could be put
 3 thereafter. The United States, acting through the United States Forest Service, was authorized to
 4 acquire this interest in the Property by virtue of 16 U.S.C. § 544g(a)(1). The restrictions on the
 5 future uses of the property contained in the Conservation Easement Deed were bargained for and
 6 paid for by the United States in furtherance of the purposes of the CRGNSA, which include the
 7 preservation and protection of the scenic and natural resources of the Columbia River Gorge.

8 9. The Conservation Easement Deed was executed by the parties and recorded in
 9 Skamania County on April 13, 1995. A true and correct copy of this Conservation Easement
 10 Deed is attached hereto and marked as Exhibit A, and is incorporated herein by this reference as
 11 though fully set out in this complaint.

12 10. Pursuant to Part II of the Conservation Easement Deed, all right, title, and interest
 13 in the property was vested in the United States as Grantee except as specifically and expressly
 14 reserved in the Grantor. Among the rights reserved to the Grantor included the following:

- 15 a. record title;
- 16 b. the right to use the property in ways that were consistent with current or past
 17 agricultural uses;
- 18 c. the right to use and maintain in the same location and of the same dimensions all
 19 existing structures relating to current agricultural uses;
- 20 d. the right to use and maintain the existing roads across the property
- 21 e. the right to gather and cut naturally dead and down timber for firewood and
 22 domestic uses and to eliminate direct safety hazards to existing structures.

23 11. Pursuant to Part IIIA of the Conservation Easement Deed, it was established as a
 24 “general purpose” of the easement to preserve and maintain the regular uses of the property as
 25 they existed at the time the easement was placed on the property.

26 12. Pursuant to Part IIID of the Conservation Easement Deed, public use and entry
 27 was not to be permitted on the property.

28 13. Pursuant to Part IIIH of the Conservation Easement Deed, all rights, title and

1 interests in the property not expressly and specifically reserved by the Grantor were deemed to
2 be acquired by the United States, and all uses of the Property not specifically reserved in the
3 Conservation Easement Deed “shall be deemed prohibited.”

4 14. The rights conveyed to the United States under the Conservation Easement Deed
5 run with the land and constitute a perpetual servitude on the Property.

6 15. On or about July 29, 2005, Richard E. Grams and Helen D. Grams conveyed their
7 interest in the Property to defendants Derek Hoyte and Columbia Crest Partners, LLC.

8 16. On or before December 16, 2008, defendant Derek Hoyte, and others acting on his
9 behalf, without the permission of the U.S. Forest Service or the County of Skamania, cleared
10 new roads and trails, graded and excavated, installed culverts, cleared brush, cut down and
11 limbed live trees, created a parking area, and erected approximately five “ziplines” with
12 associated structures including brakes, pulleys, cables and platforms. These activities were
13 conducted so that defendants could operate a commercial enterprise on the Property, advertised
14 broadly and openly to members of the general public, called “Zip the Gorge.” These activities
15 were conducted not only on the Property but also on adjoining land owned in fee by the
16 United States.

17 17. On December 16, 2008, Daniel Harkenrider, the Forest Service’s Area Manager
18 for the CRGNSA, sent a letter to defendant Hoyte identifying numerous violations of the
19 Conservation Easement Deed and requesting that defendants cease their activities until an
20 understanding of their rights to use the property could be reached. However, this letter did not
21 cause defendants to cease their activities.

22 18. Because these activities also violated certain codes and ordinances of the County
23 of Skamania, the Prosecuting Attorney for Skamania County initiated a legal action against
24 defendants. On or about February 12, 2009, a temporary restraining order was issued to
25 defendants by the Superior Court of Skamania County whereby defendants were enjoined from
26 advertising and accepting reservations for recreational use of his property until such time as they
27 received appropriate permits for their enterprise from Skamania County.

28 19. Between March 5 and May 3, 2009, defendant Hoyte submitted three applications

1 to the United States Forest Service for specified activities on the subject parcel. Each of these
 2 applications was denied by the United States Forest Service Area Manager because they were
 3 determined to be inconsistent with the terms of the Conservation Easement Deed. A subsequent
 4 “appeal” of this decision to the Regional Forester was denied.

5 20. On or about April 21, 2009, after it was discovered that defendant Derek Hoyte
 6 intentionally violated the terms of this temporary restraining order, he was held in contempt by
 7 the Superior Court of Skamania County and ordered to serve 30 days and to pay a \$1,000.00
 8 fine. The sentence was suspended on the condition that defendant Derek Hoyte pay the fine in
 9 monthly installments and allow no further violations of the Court’s order on the Property.

10 21. On or about August 27, 2009, defendant Derek Hoyte was booked into the
 11 Skamania County Jail to serve the previously suspended sentence after it was discovered that he
 12 had recommenced commercial operation of ziplines on his property in July 2009 without
 13 authorization.

14 22. On September 1, 2009, defendant Hoyte was released from custody and, thereafter,
 15 defendants disabled and partially dismantled the ziplines on the Property.

16 23. Thereafter, for the period of approximately one year, there was no known activity
 17 of this nature on the Property.

18 24. On July 29, 2010, defendant Derek Hoyte filed a “no asset” Chapter 7 bankruptcy
 19 petition in the United States Bankruptcy Court for the Western District of Washington which
 20 was assigned Case Number 10-46172-PBS.

21 25. On or about September 15, 2010, a consultant for defendant Hoyte submitted to
 22 Skamania County a proposed work plan for the construction of a suspension bridge on the
 23 Property. Neither the Skamania County or the United States Forest Service have given final
 24 approval to defendant Hoyte for the construction of a suspension bridge.

25 26. On November 11, 2010, the United States Forest Service received a report that a
 26 zipline or ziplines had been reinstalled on the Property. A subsequent site visit confirmed this to
 27 be the case.

28 27. On or about November 12, 2010, the United States Bankruptcy Court entered an

1 order of discharge in defendant Hoyte's bankruptcy case under Chapter 7 of the bankruptcy
2 code.

3 28. On or about November 15, 2010, a Hearing Examiner in Clark County ordered
4 defendant Hoyte, doing business as "Heritage Farms Canopy Tours," to cease operations and
5 remove zip lines from a 5 acre parcel in Washougal, Washington, because he had failed to apply
6 for or obtain necessary permits from the County. The Hearing Examiner also reportedly fined
7 Defendant Hoyte \$750 because he continued to operate the ziplines after the county issued an
8 order to cease operations on September 1, 2010.

9 29. At approximately the same time as defendant Hoyte was being ordered to cease
10 operations at Heritage Farms Canopy Tours, the United States Forest Service began to receive
11 more reports of ziplines being erected on the Property.

12 30. On December 13, 2010, in a telephone conversation with United States Forest
13 Service personnel, defendant Hoyte admitted that ziplines had been reinstalled and were
14 operational.

15 31. On December 14, 2010, United States Forest Service personnel visited the
16 Property and confirmed that the ziplines had been reinstalled. In addition, U.S. Forest Service
17 personnel observed that the construction of a suspension bridge was in progress.

18 32. On December 16, 2010, United States Forest Service personnel visited the
19 Property and observed, among other things, that new ziplines had been installed, that
20 construction of a suspension bridge was continuing, and that the unauthorized roads and culverts
21 constructed by defendants was causing additional erosion and damage to the Property.

22 33. At no time has the United States Forest Service given defendants permission to
23 undertake these activities on the Property. In addition, the United States is informed and
24 believes that all of these activities have been undertaken without the permission of Skamania
25 County.

26 FIRST CLAIM FOR RELIEF

27 34. Paragraphs 1 through 33 are realleged and incorporated by reference.

28 35. Defendants, by their activities as alleged heretofore, have violated, and continue to

1 violate, restrictions place on them in their use of the Property by virtue of the Conservation
 2 Easement Deed. Specifically, defendants have operated and are continuing to operate a
 3 commercial enterprise on the Property which is not authorized under the Conservation Easement
 4 Deed. As part and parcel of this commercial activity, defendants have constructed new roads,
 5 trails and a parking area, cut down or limbed live trees, installed culverts, impaled on trees
 6 supporting structures for pulleys, brakes and platforms, and strung cables across the Property for
 7 the purpose of offering zip line rides to the general public for monetary compensation. In
 8 addition, defendants are in the process of constructing a large suspension bridge on the Property
 9 as a tourist attraction.

10 36. These activities are all prohibited by the terms of the Conservation Easement
 11 Deed.

12 37. Defendants' activities have resulted in widespread ground disturbance on the
 13 Property, including the disturbance of slopes and drainages from the building of new roads and
 14 trails to accommodate vehicular traffic and other commercial operations, injuries to flora and
 15 fauna, creation of unnatural corridors between trees to accommodate zip lines, and the setting of
 16 structural platforms for a suspension bridge. In addition, defendants' activities have introduced
 17 a noxious weed that poses a risk to the natural flora of the Property.

18 38. Defendants have caused injury, and continue to cause injury to the United States'
 19 rights in the Property as set forth in the Conservation Easement Deed which, limits the property
 20 to existing uses and was expressly intended to preserve the Property in the aesthetic condition
 21 which existed at the time the easement was granted.

22 39. Defendants have caused injury, and continue to cause injury to the United States'
 23 rights in the Property as set forth in the Conservation Easement Deed, which prohibits public use
 24 and entry on the property by operating and continuing to operate a commercial enterprise on the
 25 property whereby members of the general public are invited on the property for recreational
 26 purposes conditioned upon a monetary payment to defendants.

27 40. The harms alleged above are irreparable.

28 41. The equities tip strongly in favor of the United States.

SECOND CLAIM FOR RELIEF

42. Paragraphs 1 through 41 are realleged and incorporated by reference.

43. As alleged above, some of defendants' injurious activities have occurred on adjoining land to which the United States owns title outright. Defendants did not have the permission or consent of the United States to enter upon United States property, to take timber, or to engage in any ground disturbing activities.

44. Accordingly, the United States is entitled to an order enjoining defendants from entering upon property of the United States, or conducting any activities thereon, including but not limited to building, using or maintaining any roads or trails, cutting down, limbing or otherwise making use of any trees, or otherwise engaging in any ground disturbing activities.

THIRD CLAIM FOR RELIEF

45. Paragraphs 1 through 44 are realleged and incorporated by reference.

46. Defendants, without lawful authority, misappropriated timber belonging to the United States.

47. This misappropriation was willful or reckless.

48. Pursuant to RCW 64.12.030, the United States is entitled to treble damages.

FOURTH CLAIM FOR RELIEF

49. Paragraphs 1 through 48 are realleged and incorporated by reference.

50. Clean Water Act ("CWA") section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters except in compliance with, *inter alia*, a permit issued pursuant to CWA section 404, 33 U.S.C. § 1344.

51. CWA section 404(a), 33 U.S.C. § 1344(a), authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites, after notice and opportunity for public comment.

52. CWA section 502(12), 33 U.S.C. § 1362(12), defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source."

53. CWA section 502(6), 33 U.S.C. § 1362(6), defines "pollutant" to include, inter

1 alia, dredged spoil, rock, sand and cellar dirt.

2 54. CWA section 502(7), 33 U.S.C. § 1362(7), defines "navigable waters" as "the
3 waters of the United States, including the territorial seas."

4 55. 33 C.F.R. § 328.3(a)(1), (2), (5) and (7), and 40 C.F.R. § 232.2, define "waters of
5 the United States" to include: (i) all waters which are currently used, were used in the past, or
6 may be susceptible to use in interstate or foreign commerce; (ii) all inter-state waters;
7 (iii) tributaries to such waters; and (iv) wetlands adjacent to such waters or their tributaries.

8 56. 33 C.F.R. § 328.3(b) and 40 C.F.R. §§ 122.2 and 232.2 define "wetlands" as "those
9 areas that are inundated or saturated by surface or ground water at a frequency and duration
10 sufficient to support, and that under normal circumstances do support, a prevalence of vegetation
11 typically adapted for life in saturated soil conditions."

12 57. CWA section 502(14), 33 U.S.C. § 1362(14), defines "point source" to include
13 "any discernible, confined and discrete conveyance . . . from which pollutants are or may be
14 discharged."

15 58. CWA section 502(5), 33 U.S.C. § 1362(5), defines "person" to include "an
16 individual [or] corporation."

17 59. CWA section 309(b), 33 U.S.C. § 1319(b), authorizes the commencement of a
18 civil action for appropriate relief, including a permanent or temporary injunction, against any
19 person who violates CWA section 301(a), 33 U.S.C. § 1311(a).

20 60. CWA section 309(d), 33 U.S.C. § 1319(d), authorizes the commencement of an
21 action for civil penalties against any person who violates CWA section 301(a), 33 U.S.C.
22 § 1311(a).

23 61. On an unknown date or dates commencing in 2008, one or more of the Defendants
24 and/or persons acting on their behalf, discharged dredged or fill material into waters of the
25 United States without a permit under CWA section 404 on the Property.

26 62. The dredged or fill material that one or more of the Defendants and/or persons
27 acting on their behalf, caused to be discharged includes, among other things, dirt, spoil, rock and
28 sand, all of which constitute "pollutants" as defined in CWA section 502(6), 33 U.S.C.

1 § 1362(6).

2 63. One or more of the Defendants and/or persons acting on their behalf used
3 mechanized land-clearing and earth-moving equipment to accomplish the discharges. This
4 equipment constitutes "point sources" as defined in CWA section 502(14), 33 U.S.C.

5 § 1362(14).

6 64. Defendants did not obtain a permit from the Secretary of the Army, acting through
7 the Chief of Engineers, for the discharges of dredged or fill material into waters of the United
8 States as required by CWA sections 301(a) and 404, 33 U.S.C. §§ 1311(a), 1344.

9 65. One or more of the Defendants either owned, leased or otherwise controlled the
10 land on which each unauthorized discharge of dredged or fill material into waters of the United
11 States occurred.

12 66. One or more of the Defendants conducted, contracted for, supervised and/or
13 otherwise controlled the unauthorized activities at issue in Paragraph 64.

14 67. Defendants are persons within the meaning of CWA section 502(5), 33 U.S.C.
15 § 1362(5).

16 68. Defendants have violated and continue to violate CWA section 301(a), 33 U.S.C.
17 § 1311(a), by their unauthorized discharges of dredged or fill material into waters of the United
18 States, including wetlands.

19 69. Each day that such material remains in place constitutes a separate violation of
20 CWA section 301(a), 33 U.S.C. § 1311(a).

21 70. Unless enjoined, Defendants are likely to continue to discharge dredged or fill
22 material into and/or to allow dredged or fill material to remain in waters of the United States on
23 the Property in violation of CWA section 301, 33 U.S.C. § 1311.

24 **WHEREFORE, plaintiff UNITED STATES OF AMERICA, respectfully prays:**

25 1. For a temporary restraining order enjoining defendants, their officers,
26 representatives, agents, servants, employees, contractors, and all persons acting in concert or
27 participating with them, from engaging in any ground disturbing activities on the Property,
28 including, but not limited to, using, building or maintaining any roads which were not in

1 existence on April 13, 1995, cutting down or limbing trees, proceeding further with any
2 construction on the property, including work on the suspension bridge, zip lines, improved road
3 access to State Highway 14, or any parking area on the property, engaging in any commercial
4 activity on the property, and from using ziplines, or allowing others to use ziplines on the
5 property, during the duration of the order.

6 2. For a preliminary injunction, to remain in place until such time as the case can be
7 heard on the merits;

8 3. For a permanent injunction enjoining defendants from engaging in any further
9 unauthorized use of the property in violation of the Conservation Easement Deed, and directing
10 defendants to dismantle and remove all unauthorized structures and to restore the land, as nearly
11 as possible, to its preexisting condition;

12 4. For a permanent injunction enjoining defendants from discharging or causing the
13 discharge of dredged or fill material or other pollutants into any waters of the United States
14 except in compliance with the CWA;

15 5. That the defendants be enjoined to undertake measures, at defendants' own
16 expense and at the direction of the Environmental Protection Agency, to effect complete
17 restoration of the Property and/or to conduct off-site mitigation for irreversible environmental
18 damage, as appropriate;

19 6. For an award of damages to compensate the United States for defendants'
20 unlawful use of its property

21 7. For an award of treble damages for defendants' wilful or reckless misappropriation
22 of timber without lawful authority;

23 8. That the defendants be assessed pursuant to CWA section 309(d), 33 U.S.C.
24 § 1319(d), a civil penalty for each day of each violation of the Clean Water Act;

25 9. For its costs of suit; and
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28

1 10. For such other and further relief as the court may deem just and proper.

2 DATED this 10th day of December, 2012.

3
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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the parties.

s/ Dung Phan
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